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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1528

NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit issue in this case.

The Opinion Below

The opinion of the Court of Appeals (*Oakes* and *Hays*, JJ., with *Friendly*, J. dissenting), not yet reported, is in the Appendix (1a-14a).

Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within 90 days of the court's judgment dated January 25, 1978.

Questions Presented

1. Has the Federal Communications Commission (FCC) jurisdiction to determine the amount of fees state cable television regulatory agencies may charge cable television systems within their jurisdiction, where this Court's consistent construction of § 2(a) of the Federal Communications Act (47 U.S.C. § 152[a]) limits FCC jurisdiction over cable television to subjects reasonably ancillary to the FCC's statutory jurisdiction over broadcast television?

2. Was the FCC ruling effectively halting state control over cable television by declaring New York's law imposing 2% fees on cable television systems since March 31, 1972 inconsistent with FCC Rule 76.31(b), which exempts systems in operation prior to that date, correct?

Statute and Regulation Involved

Section 2(a) of the Federal Communications Act, 47 U.S.C. § 152(a), provides:

> "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communications or transmission wholly within the Canal Zone."

FCC regulation § 76.31(b) (47 CFR § 76.31[b]), at the time this proceeding was instituted, stated:

> "Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977, whichever occurs first."

Statement of the Case

This proceeding was commenced pursuant to 28 U.S.C. § 2344 to review an order of the FCC dated February 3, 1977 which upon reconsideration adhered to its original ruling that certain cable television fees imposed by New York Executive Law § 817 were inconsistent with the federal agency's regulation on the subject, despite the plain language of that regulation.

The FCC's order not only was completely opposite to the clear wording of the regulation, but represented an assumption by the FCC of jurisdiction far beyond anything reasonably ancillary to its jurisdiction over broadcasting, and an undermining of the states' police-power jurisdiction in an area reserved to them.

Cable television systems in New York are regulated pursuant to Article 28 of the Executive Law, enacted in 1972, which established a State Commission on Cable Television with responsibility to enforce construction standards (§ 820) and to prescribe standards for municipalities in issuing franchises (§ 815) and their transfer and amend-

ment (§ 822). Other provisions empower the State Commission to regulate rates (§ 825) and abandonments of service (§ 826) as well as the reliability of service (§ 824). This act is designed to protect the consumers of New York from financially irresponsible operators as well as from excessive municipal franchise fees—a basic exercise of the police power. The State Commission, like other State agencies regulating utilities, banks and insurance companies, imposes annual fees on the regulated industry to defray its costs and expenses (§ 817) according to a statutory formula apportioning to each company a pro rata share, up to a ceiling of 2% of the company's gross receipts. Prior to a 1975 amendment the ceiling was 1%.* Section 817 took effect May 24, 1972.

Section 818 of the New York law specifically authorizes municipal franchise fees provided the sum of state and municipal fees "does not exceed the maximum amount permitted by applicable federal law, rules or regulations."

In the same year, 1972, the FCC, although its jurisdictional basis was highly tenuous, see *Home Box Office, Inc.* v. *F.C.C.*, 567 F. 2d 9 (D.C. Cir. 1977), cert. den. —— U.S. ——, 54 L. Ed. 2d 89, reh. den. *id.* 484, enacted regulations dealing with cable-television fees and standards for franchises (47 CFR § 76.31). Section 76.31(b) limited franchise fees to 3% of gross revenues, and allowed fees of up to 5% to be approved by the FCC in its discretion. The regulation added, in the sentence at issue here:

> "With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977,** whichever occurs first."

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* See N.Y. Laws 1975, ch. 586.

** This date was extended to March 31, 1978 and thereafter to March 31, 1987 by subsequent FCC orders.

In 1975 the State Commission brought the proceeding here under review, requesting an FCC ruling as to whether § 817 was consistent with § 76.31(b) in a number of respects. Only one is at issue here. On June 24, 1976 the FCC ruled:

> "Section 817 • • • is not consistent with Section 76.31(b) • • • insofar as the State fee when combined with an applicable grandfathered municipal fee, exceeds 5% of total gross subscriber revenues."

This ruling meant that cable television systems could not be charged a fee during the grandfathering period which, when added to their municipal franchise fee, exceeded 5%. This, however, flies in the face of the language of the final sentence of the rule making it ineffective until March 31, 1987 or the end of the franchise period "[w]ith respect to a cable television system that was in operation prior to March 13, 1972." It is clearly the date when the system went into operation, not the date of the fee imposed, that governs under the FCC rule.

In 1976 the State Commission petitioned for reconsideration, pointing out the inconsistency in the FCC ruling as well as the FCC's own statements showing its consistent intent to exempt state-regulated cable systems in operation before March 31, 1972 from the rule—especially since such grandfathered systems did not even require FCC certification until the expiration of their franchises or the grandfathering period. The FCC adhered to its previous conclusion.

New York thereupon brought this proceeding, pointing out that the FCC's rule is written in plain words and should be plainly read. It limits franchise fees to 3% of gross revenues, allows fees of up to 5% where appropriate and reasonable, and goes on to exempt, or "grandfather," systems in operation prior to March 31, 1972. It exempts State laws as applied to systems, not individual fees, from its limitations.

This comports with the scheme of the regulations read as a whole, and with their history. Prior to 1972 cable television franchises, fees and service were not regulated at all by the FCC. See *Home Box Office, Inc.* v. *FCC, supra,* 567 F.2d at 22. In that year the Commission issued a *Cable Television Report and Order,* FCC 72-108, 36 FCC 2d 143, in which it considered and rejected federal licensing or other preemptive activity and chose instead "a deliberately structured dualism" (*id.* ¶ 177) "with franchises issued by local authorities, but with minimum standards for those franchises set by the Commission and administered by it in the certification process" (*Notice of Proposed Rule Making,* FCC Docket 21002 [1976], p. 85:274). Local authority was expressly defined to include states (*id.*).

Congress too, through the House Commerce Committee, examined this matter. The *Notice of Rule Making* (*id.* p. 85:276) described its conclusions:

> "Congress also has been concerned with federal-state relations in the cable franchising process. The staff of the House Commerce Committee's Communications Subcommittee issued a report in January 1976 entitled 'Cable Television: Promise versus Regulatory Performance.' Although this report considered the Commission franchise objectives generally commendable, it recommended that the Commission's minimum franchise requirements be eliminated. It asserted that the matters covered therein are not appropriate matters for federal regulation; moreover, it recommended establishment of state cable commissions which would provide for statewide licensing of cable systems but would ensure participation of local governments."

Accordingly, the FCC adopted franchise standards applicable to all television franchises adopted after March 31, 1972. Previously franchised systems were exempt until March 31, 1977 or the expiration of their franchises, whichever occurred first (§ 76.31). *Notice of Rule Making* at p. 85:276. The 1977 date was later extended at the insistence not of the states or localities but of the cable television companies themselves (*id.*).

With regard to state and local fees, which the Congressional Committee Report explicitly found to be "not a matter of federal concern" (*id.* p. 85:280), the Commission adopted a compromise position of establishing maximum fees which states and localities might impose and exempting from federal fee control until March 31, 1978—later extended to 1987—all systems in operation on March 31, 1972.

See also the FCC *Cable Television Report & Order, supra,* FCC 72-108, 36 FCC 2d 143, ¶ 187 ("Grandfathering"): "An existing cable system will be required to certify within five years of the effective date of these rules [1972] or on renewal of its franchise, whichever comes first, that its franchise meets the requirements of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause."

Yet the Commission held that as to systems with fees in excess of 5% if the state fee is included, "the imposition of the state fee in addition to the local fee would be inconsistent with § 76.31(b)." Declaratory Ruling, June 24, 1976, 37 Pike & Fischer RR 2d 1156.

This ruling flew in the face of the clear intent not to preempt, expressed both by Congress and by the FCC itself. It deprives the state of the resources to adequately protect the public from abuses and irresponsibility on the part of cable television operators—especially ironic in view of the total abdication of the FCC from regulation in the interest of the subscriber in September 1977, when it decided Docket 21002, repealing all its standards for municipal franchises and leaving only the limits on fees. 41 Pike &

Fischer RR 2d 885. It does violence to the fabric of federal-state relationships in this area, violence particularly anomalous in view of the FCC's own abdication.

The State Commission therefore brought this proceeding, pointing out, in addition to the FCC's disregard of the words of its own regulation, that an amendment of the regulation should be accomplished through a rule-making proceeding and not by *ipse dixit* in disregard of basic tenets of administrative law. This point had been raised in the State's motion for reconsideration before the FCC, but ignored.

As we have seen, subsequent to the filing of this suit the FCC, in Docket 21002, decided September 30, 1977, both extended the grandfathering period to fifteen years from the date of the franchise and allowed somewhat greater franchise fees, noting that Congress had found "fee regulation was not a matter of federal concern." Docket 21002, p. 19.

The Decision Below

The majority, although recognizing that "[r]ead literally" the regulation does not bar the State's fee (3a), nevertheless held the regulation did not mean what it said but rather precluded a state from increasing its fee for any reason during the grandfathering period. It conceded that there was "probably * * * an inadvertent gap in the intent of the regulators" and that "no thought whatsoever seems to have been given to state franchise fees" (8a), yet followed the FCC's labyrinthine explanation of how the regulation, despite its language, bars the State from increasing its fees. It based this extraordinary ruling, which flies in the face of federalism, on the straw man hoisted by the FCC and its allies, the cable operators, of unlimited fee increases by states and localities. The record here shows that New York's modest 1% fee was only increased once, to 2%, in 1975. There was not the slightest showing

of any prospect of its future increase, let alone the burdensome increases portrayed by the industry and the majority.* We must remember that the State Commission, in New York at least, is the only agency protecting the subscriber from abuses—the raison d'être of any government regulation in this area. The FCC has totally renounced any regulation of franchises. The State Legislature found as a fact that the municipalities' regulation was inadequate. If the State is crippled, as this decision would accomplish, there will be in effect no regulation at all to prevent or redress fraud or abandonment of service, despite New York's legislative finding that these measures are necessary.

The majority went on to conclude that "the cable operators do have certain 'equities involved in [their] justifiable reliance on specific franchise terms negotiated before [they were] placed on notice of the . . . 1972 [regulation]' " (10a). The regulation, which means the precise opposite of what the FCC now insists it means, and which it is free to amend in a rule-making proceeding, is a flimsy basis indeed for imposing so draconic a requirement on the State Commission. Thus the FCC, paradoxically, takes the side of the industry it purports to regulate and turns its guns on the state's regulatory agency.

The dissent by former Chief Judge Friendly noted that "we have not quite reached the Humpty Dumpty era where a word 'means just what I choose it to mean, neither more nor less' " (11a). He pointed out (11a-12a):

> "There can be no fair doubt of the meaning of the grandfather clause . . . as a matter of ordinary Eng-

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* The majority itself, after blandly accepting the FCC's fear of "burden[ing] cable television to the extent that it will be unable to carry out its part in our national communications policy" (7a), noted that "state commissions are subject to the presumably responsible acts of their own legislatures, and in any event are limited by future valid rulemaking proceedings" (9a-10a).

lish speech. The clause 'grandfathered' existing systems, not simply existing rates."

Turning to the majority's spectre of rampant fees, Judge Friendly noted (12a):

> "These modest regulatory charges, limited by New York to the minimum necessary to cover the costs of regulation, and in no case to exceed 2% of gross annual receipts, were not the sort of exaction against which the Commission properly wished to guard."

He added (13a), "[t]he argument in favor of reading the regulation to mean what it says is strengthened by the ease with which the Commission could have changed it."

Reasons for Granting the Writ

A. The Commission exceeded its jurisdiction in purporting to regulate state and municipal franchise and regulatory fees.

Although the State chose not to raise the jurisdictional issue below, it is crystal clear that the FCC lacked power to dictate the amounts of state and municipal cable television fees. The controlling statute, § 2(a) of the Act (47 U.S.C. § 152[a]), as consistently interpreted by this Court, limits the FCC's authority over cable television to matters "reasonably ancillary" to its statutory jurisdiction over broadcasting.

In cases involving a variety of attempts by the FCC to control aspects of cable television, the courts have insisted that subjects not reasonably ancillary to its broadcasting jurisdiction are beyond its authority. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 159-160, upholding rules as to "distant signals" from broadcasting stations carried by cable into communities not otherwise within reach on the ground that "the achievement of [the]

agency's ultimate purposes" was at stake (*id.* at 177). *Home Box Office, Inc.* v. *FCC, supra,* 567 F. 2d 9, rejected as beyond that limited jurisdiction an FCC rule purporting to regulate cable television program content and advertising. Again in *Midwest Video Corp.* v. *FCC,* —— F. 2d ——, 46 LW 2447 (8th Cir., Feb. 21, 1978), the court held the Commission had once more exceeded its jurisdiction with a rule mandating access by public interest groups and others to cable systems. The Eighth Circuit held these rules exceeded "the outer limits of the Commission's delegated jurisdiction." Opinion p. 24. The court further held (*id.* p. 26):

> "[The FCC] has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified."

See also the pending application for certiorari in *Pappas Television, Inc.* v. *FCC,* No. 77-1101, again raising the "reasonably ancillary" issue.

As the court noted in *Midwest Video,* p. 28, "[t]o be 'reasonably ancillary,' the Commission's rules must be reasonably ancillary to something." Here, as there, the FCC lacked jurisdiction in the first place over the subject. Its ruling cannot bootstrap a jurisdiction which Congress never authorized.

The FCC here exceeded its limits as defined by Congress in *Cable Television: Promise versus Regulatory Performance,* the 1976 report of the House Commerce Committee's Subcommittee on Communications. That report expressly rejected FCC jurisdiction over cable television franchises (p. 80):

> "The fact that the Commission has the authority to require cablecasting does not mean that it has the authority to require public franchising proceedings,

good character, equitable construction, etc. For if it does have that additional authority, it means that the FCC can construct a mini-Communications Act for cable, requiring the states or localities to meet myriad legal specifications. In Chief Justice Burger's view [in *United States* v. *Midwest Video, Inc.*, 406 U.S. 649, 706], such a sweeping program must come from the Congress, not the administrative agency."

It has not been enacted.

B. The Court below incorrectly gave its stamp of approval to the FCC's flagrant misreading of the regulation so as to thwart state regulatory jurisdiction over cable television.

The FCC's rule is written in plain words and should be plainly read. It refers to systems, not fees. As we have shown, the convoluted reading insisted on by the FCC not only breaches the rules of construction and defies common sense, but also leads to an absurd result. It defies the rule that statutes and regulations should be accorded their plain meaning, particularly where their wording is clear and unambiguous. *Malat* v. *Riddell*, 383 U.S. 569; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420.

The wording exempting systems, not fees, was intentionally chosen and is an integral part of the FCC's approach to cable-television regulation. The grandfathering of existing franchises in § 76.31(b) was imposed by the FCC, not the states. It was done to protect not states or municipalities but the companies themselves.

State fees could scarcely have been at issue in 1972 when the FCC enacted § 76.31(b), since no state regulatory commission even existed then in the cable-television area. It was municipal franchise fees which the FCC desired to limit for the benefit of the companies, and the FCC declared the specific purpose of grandfathering was to avoid municipalities auctioning off franchises to the

highest bidder or siphoning franchise fees off for general municipal purposes. These laudable reasons, however, have nothing to do with the State Commission and plainly should not be used as an excuse for giving the wording of the rule at bar a reading at odds with its plain language which would hamstring the State's regulatory program.* It is fundamental that "[w]here the words of a statute are unambiguous, as here, it is unnecessary to speculate about legislative intent." *Strachan Shipping Co.* v. *Hollis*, 323 F. Supp. 1122 (S.D. Tex. 1970), cert. den. 409 U.S. 887, reh. den. *id.* 1002.

The irony of the result sought here by the FCC is evident. The very purpose of the State Commission is to prevent the same abuses which originally concerned the FCC itself—the lack of standards and criteria in franchising by municipalities and the need to protect the industry "from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; * * *." See N.Y. Executive Law § 811.

The State Commission was explicitly given regulatory jurisdiction to "prescribe standards for procedures and practices which municipalities shall follow in granting franchises," including public bidding, written reports by the municipality "setting forth the reasons for its decision in awarding the franchise" (Exec. Law § 815[2][a]) and including public participation (*id.*; § 821). The State Commission may set aside rates charged the public which are preferential or discriminatory (§ 825).

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* The effect of the decision below is to place the State Commission between the Scylla of being unable to impose the fees necessary to survive and the Charybdis of reducing the franchise fees charged by municipalities—perhaps an unconstitutional impairment. This dilemma is demonstrated by *Mtr. of Cerrache Television Corp.* v. *Kelly*, 50 A D 2d 134 (3rd Dept. 1975), holding, as the State Commission here contends, that § 76.31(b) did not preempt the State from enforcing its statute.

Thus the claim by the FCC that its new interpretation of its rule is required to protect the public is misplaced. It is the companies, not the public, which receive the benefits of grandfathering, and the FCC is free to do away with the entire grandfathering rule if it sees fit.

As noted, the spectre of rapidly increasing state fees is raised here as if it had some basis in fact. In reality the statutory fee in New York is fixed at the minimum amount sufficient to defray the Commission's expenses, and may in no event exceed 2% of any company's gross revenues (§ 817). This amount is far less than most municipal franchise fees, and unlike some municipalities the State of New York is barred by statute from using these fees for any purpose other than regulation of the industry (§ 817). It would take an act of the Legislature to increase the fees which the State Commission may charge—an amendment to the Executive Law which, as Judge Friendly noted (14a), the Commission does not envisage in the foreseeable future. This "specter of possible 'horribles'" should be ignored. The court is "only called upon to decide this specific case." *Lee Fook Chuey* v. *Imm. & Nat. Service,* 439 F. 2d 244, 249 (9th Cir. 1971).

What federal objective would be thwarted by giving the words of the FCC's rule their manifest meaning? Certainly not the limitation of fees, for we have seen that the State's 2% fee is far less than those charged by municipalities without FCC objection. Certainly not any desire on the part of the FCC to closely control franchises—for in its recent Report and Order (Docket 21002, decided Sept. 30, 1977) it abdicated control over franchises in every respect save this. In fact the FCC must have meant what it said, and far from amending its rule to have it say what it now urges, as it is free to do, in Docket 21002 it extended the time during which systems are grandfathered to 15

years from the date of the franchise (unless the franchise sooner expires by its terms).

The Congressional Report, *supra,* notes the extent of state regulation of cable television, which now exists in Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island and Vermont. Report p. 23. As of 1976 there were 11,231,800 subscribers—a number which has increased since, plus another 1,600,000 pay-cable subscribers. *Id.* pp. 24, 25. Congress explicitly concluded that as to the "franchise fee, • • • the ideal solution rests with state regulation." Report p. 84. It recommended that states which did not regulate cable television "should be encouraged to do so." *Id.* p. 85. The FCC's decision is completely unresponsive to these direct expressions by Congress. Instead it seeks to repress the very regulation by the states which Congress urged.

Moreover, the FCC here disregarded the "well-established precept that the governmental agencies must scrupulously conform to their own rules." *Mandel* v. *United States Department of H.E.W.,* 411 F. Supp. 542, 554 (D. Md. 1976), citing *Service* v. *Dulles,* 354 U.S. 363. See also *Morton* v. *Ruiz,* 415 U.S. 199, 235; *Francis* v. *Davidson,* 340 F. Supp. 351, 368 (D. Md. 1972), aff'd 409 U.S. 904:

> "The principle which accords weight to an agency's interpretation of its own regulation is inapplicable insofar as that interpretation is inconsistent with the requirements (in this case, mandatory requirements) of its own regulation validly promulgated under authority delegated to it by the Congress."

See to the same effect *Associated Third Class Mail Users* v. *United States Postal Service,* 569 F.2d 570, 600 (D.C. Cir. 1976, vac. on other gds. —— U.S. —, 54 L.Ed.2d 169:

> "Where the words in question, as here, do not require any special competence for their interpretation,

a court may be equally or better qualified to interpret them than is the agency • • •."

Long ago, in a paragraph relied on by courts to this day, this Court wrote:

> "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. • • • [I]in cost cases, the plain meaning of a provision not contradicted by any other provision in the same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield*, 4 Wheat. (17 U.S.) 122.

This Court has consistently granted certiorari where issues important to the construction of the Federal Communications Act have been raised. See, *e.g.*, *FCC* v. *Schreiber*, 381 U.S. 279, 288; *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 89; *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 527.

Here, the FCC, entering a field which Congress never authorized it to regulate, adopted a rule and then proceeded, circumventing the rule-making proceeding mandated by the Administrative Procedure Act, to utterly distort its own rule. The effect of these forays on the state's regulatory program would be devastating. They should not receive judicial sanction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 18, 1978

Respectfully submitted,

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Appendix A, Opinion, United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CICRUIT

No. 113—September Term, 1977.

(Argued November 2, 1977 Decided January 25, 1978.)

Docket No. 77-4079

NEW YORK STATE COMMISSION
ON CABLE TELEVISION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

NEW YORK STATE CABLE TELEVISION ASSOCIATION,
MANHATTAN CABLE TV, INC.,

Intervenors.

Before:

FRIENDLY, HAYS and OAKES,

Circuit Judges.

Petition challenging FCC determination that "grandfather" clause of 47 C.F.R. § 76.(b) operates to limit franchise fees of grandfathered cable television systems. Petition to review denied.

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torney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Petitioner*

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Robert S. Smith, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. (Stuart Robinowitz and Susan P. Carr, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., of counsel), *for Intervenor New York State Cable Television Association.*

Oakes, *Circuit Judge:*

This petition for review[1] requires our construction of a 1972 Federal Communications Commission (FCC) regulation (Regulation or Section 76.31(b)) limiting combined

[1] Jurisdiction exists under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Venue is properly laid pursuant to 28 U.S.C. § 2343.

state and local franchise fees imposed upon cable television (CTV) systems.[2] Those systems in operation prior to March 31, 1972, were "grandfathered" under the Regulation. The controversy centers on the parameters of this special treatment.

Read literally as petitioner, New York State Commission on Cable Television (State Commission), urges, the Regulation would permit combined state and local franchise fees of grandfathered systems to be increased without limit. The FCC and the intervenors (New York State Cable Television Association and Manhattan Cable TV, Inc.) construe the Regulation to allow combined fees in effect on the date of the Regulation to remain effective through a specified date,[3] even where those fees exceed the amount normally permitted under the Regulation, but not to permit an *increase* in the combined fees. Indeed, the FCC so held in New York State Commission on Cable

[2] It provides in pertinent part:

> Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977, whichever occurs first.

47 C.F.R. § 76.31(b) (1976).

[3] The termination date of the grandfather period as originally established by the Regulation was the earlier of the grandfathered system's current franchise period or March 31, 1977. *Id.*

Television, 59 FCC 2d 1344 (1976) (hereinafter NYSCCT). On the State Commission's petition for reconsideration, the FCC adhered to its nonliteral interpretation of the Regulation, 62 FCC 2d 975 (1977) (hereinafter NYSCCT Reconsideration). And in a subsequent rulemaking proceeding, the FCC reiterated its position.[4] 41 Pike & Fischer RR 2d 885, 887, 901-06 (Sept. 30, 1977) (No. 21002).

I

Factual Background

The Regulation is one product of a comprehensive, interrelated rulemaking proceeding which examined virtually all aspects of CTV service, including broadcast signal carriage, public access, technical standards and franchise standards.[5] The franchise fee limitation was promulgated in response to evidence that some municipalities were exacting fees far in excess of their costs of regulation. Some fees were as high as 40% of gross subscriber revenues. *Id.* at 901. The limitation actually imposed—3% without FCC

[4] The proceeding also extended the grandfather period from five to fifteen years. Thus, a higher combined fee may be imposed on grandfathered systems for fifteen years or until the end of the current franchise period, whichever occurs first. 41 Pike & Fischer RR 2d 885, 887 (Sept. 30, 1977) (No. 21002). In addition, the fee base was broadened to include revenues from cable services as a whole, not simply from subscribers' payments. *Id.* *See* note 10 & accompanying text *infra*.

[5] *See Cable Television Report & Order*, 36 FCC 2d 143, 147 (hereinafter *CTV Report*), *reconsideration granted in part*. 36 FCC 2d 326 (1972) (hereinafter *CTV Report Reconsideration*); *Clarification of the Cable Television Rules*, 46 FCC 2d 175 (1974) (hereinafter *Clarification*); 47 C.F.R. § 76.1 (1976). The FCC has asserted jurisdiction over CTV since at least 1966. *See Second Report and Order*, 2 FCC 2d 725 (1966); Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. Rev. 816, 826 (1970).

approval, up to 5% with FCC approval on a showing of no interference with federal regulatory objectives and of appropriateness "in light of the planned local regulatory program," 47 C.F.R. § 76.31(b) (1976)—was believed to "strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to "strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation."[6] *CTV Report*, 36 FCC 2d at 209.

Prior to adoption of the Regulation, the municipalities of New York imposed fees on cable systems. After the Regulation was promulgated New York established a state commission on CTV to regulate the industry. N.Y. Exec. Law Art. 28, §§ 811-31 (McKinney Supp. 1976). Section 817 of the Law initially imposed a franchise fee to cover those State Commission operating costs and expenses which exceeded appropriations received, with an outer limit of 1% of gross annual receipts. This section was amended in 1975, raising the maximum fee to 2%. Certain CTV operators, including intervenor Manhattan Cable TV, refused to pay some or all of the state fee on the basis that the State's exaction could not be added to the grandfathered municipal fees already in excess of the 5% maximum allowed by Section 76.31(b). The State Commission then sought a declaratory ruling from the FCC that collection of the 2% state fee was consistent with Section 76.31(b).

[6] The need to balance federal goals and state needs was subsequently reaffirmed by the FCC in its recent rulemaking proceeding. The FCC noted that "nothing in [its] experience under [The Regulation], nor in the comments submitted . . . has eroded the reasonableness of the underlying balance and policy objective" and that "a majority of local governments filing comments . . . favored retention of the basic fee limitation . . ." 41 Pike & Fischer RR 2d at 904.

The original FCC decision held that because the state fee was imposed after adoption of the Regulation it was subject to the Regulation's limitations. NYSCCT, *supra,* 59 FCC 2d at 1353. On reconsideration the FCC noted that the grandfather provision was adopted to avert minor dislocations and to protect reliance by operators and municipalities on franchise terms negotiated prior to the Regulation's promulgation. "That equitable concept," the FCC held, "would be destroyed if . . . the franchise fee were free to rise indiscriminately beyond its pre-1972 contract level." NYSCCT Reconsideration, *supra,* 62 FCC 2d at 978 (footnote omitted).

II

Discussion

Petitioner argues vigorously that the plain meaning of the Regulation permits imposition of new state (and assumedly local) fees on systems operating before the Regulation's effective date, March 31, 1972. It is the *systems* that are grandfathered by the language of the Regulation, the argument runs, not the *fees* in existence on that date. Petitioner invokes the canon of construction that statutory and regulatory language, *United States* v. *Miller,* 303 F.2d 703, 707 (9th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963), should be given its plain and ordinary meaning, particularly where the wording is unambiguous. *Malat* v. *Riddell,* 383 U.S. 569, 571-72 (1966) ("primarily" in § 1221(1) of the Internal Revenue Code of 1954 given its ordinary meaning where literal reading is consistent with legislative purpose).

Mere incantation of the plain meaning rule, without placing the language to be construed in its proper framework, cannot substitute for a meaningful analysis. For we must remember Judge Learned Hand's stricture that "[t]here

is no surer way to misread any document than to read it literally . . . ." *Guiseppi* v. *Walling,* 144 F.2d 608, 624 (2d Cir. 1944) (concurring), *aff'd sub nom. Gemsco, Inc.* v. *Walling,* 324 U.S. 244 (1945). And as Professor Cox wisely noted, "[n]o one has ever suggested that the courts must always follow the letter of a statute regardless of the outcome, nor does any one contend that the words may be entirely disregarded. The issue is where to strike the balance." Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 Harv. L. Rev. 370, 376 (1947). The appropriate methodology, then, is to look to the "common sense" of the statute or regulation, to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed. *See United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 849 (1975); *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 543-44 (1940).

We first see that to grandfather "systems" without grandfathering their "fees" would not make much sense. The grandfather clause does not exist in a vacuum. The broad purpose of the franchise fee limitation was to check rising fees that were wholly unreasonable because they bore no relation to the costs of regulation,[7] thereby "burden[ing] cable television to the extent that it will be unable to carry out its part in our national communications policy." *CTV Report, supra,* 36 FCC 2d at 209 (footnote omitted). The more limited objective of the grandfather clause was to "relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause," *id.* at 210. Absent a grandfather clause, the

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[7] The FCC has expressed its concern with "[t]he use of the franchise fee mechanism as a revenue raising device." *Clarification, supra,* 46 FCC 2d at 201.

limitations imposed by Section 76.31(b) might well have necessitated renegotiation of franchises already granted (and accepted).[8]

What we are probably confronted with here is an inadvertent gap in the intent of the regulators: having never considered the possibility that either state or local authorities would increase fees on grandfathered systems where combined fees already exceeded the Regulation's limits prior to its adoption, the FCC did not explicitly preclude such increases in the Regulation. Even if the agency draftsmen contemplated that a locality—no thought whatsoever seems to have been given to state franchise fees—might seek to increase fees already in excess of the Regulation's limits, they may have thought that such an increase, at least if imposed by the franchise-granting community, would operate to terminate the existing franchise. *See Clarification,* 46 FCC 2d at 197. Termination would thereby subject the franchise fee to the Regulation's limits automatically because the franchise would no longer enjoy grandfathered status. Thus only the imposition of a new *state* franchise fee or the increase of a pre-existing one could operate to increase the burden on a grandfathered system. And as the State Commission itself points out, "no state regulatory commission even existed . . . in the cable television area" when the Regulation was adopted. Reply Brief for Petitioner at 2.

If we examine the practical consequences of the alternative interpretations proffered by the parties, each side conjures up a parade of horribles. None, however, seems as nightmarish as depicted. The State Commission argues

[8] The termination of the grandfather clause after a given number of years or the expiration of the preexisting franchise, whichever occurs first, notes 2-4 *supra,* reflects the aim of not disturbing existing franchises.

that under the FCC's interpretation it is unclear whether the State must yield to franchising municipalities or vice versa: if the latter, grave problems of impairment of contracts may arise; if the former, state regulation of cable television will be largely preempted by municipal regulation. There are three responses to this suggested difficulty. First, any city-state conflict is a matter for the state courts. Second, if the State Commission is truly crippled in its regulatory efforts by the limitation, a wholly undocumented proposition, it may still seek a waiver, 47 C.F.R. § 76.7 (1976).[9] And finally, at least as of the effective date of the FCC's recent rulemaking procedure, the combined state-municipal fee on grandfathered systems has been increased from a percentage of customer subscriptions to a percentage of total system revenues.[10] Thus even though the percentages set forth in the Regulation remain the same, the broader revenue base yields greater dollar amounts for states and municipalities.

Similarly we are not fully persuaded by the intervenors' arguments that states and localities would have open season upon the grandfathered systems if the literal interpretation were to prevail. Any substantial fee increase would very likely terminate the existing franchises.[11] In addition, state commissions are subject to the presumably

[9] Petitioner argues that the availability of the waiver provision is illustory in view of the FCC's statement in Paragraph 120 of its *Clarification, supra.* 46 FCC 2d at 207: "It is unlikely that we will allow waivers for any proposal that exceeds a total of five percent for regulatory and non-regulatory purposes." But this statement of the FCC's waiver policy clearly does not preclude a waiver when fees for *regulatory* purposes alone exceed 5%, and the FCC has so stated in its recent rulemaking proceeding. 41 Pike & Fischer RR 2d at 905.

[10] *See* 41 Pike & Fischer RR 2d at 887, 910-11 n.27.

[11] *Clarification, supra,* 46 FCC 2d at 197.

responsible acts of their own legislatures, and in any event are limited by future valid rulemaking proceedings.

The equities of this dispute must also be considered. Grandfathered systems are to some exent already discriminated against by virtue of the existing higher fees permitted for the limited time set forth by the Regulation. To expose them to the risk of still higher fees, or premature franchise renegotiation (and initial certification by the FCC[12]) or of even litigation costs is a consequence which the FCC might rightfully wish to avoid in the public interest. Thus, we agree with the FCC that the cable operators do have certain "equities involved in [their] justifiable reliance on specific franchise terms negotiated before [they were] placed on notice of the . . . 1972 [regulation]." NYSCCT Reconsideration, *supra*, 62 FCC 2d at 978. *See also CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *reconsideration denied*, 40 FCC 2d 493 (1973) (permitting grandfathering of pre-1972 franchised CTV systems in substantial compliance with FCC rules even though they had not gone into operation because of equity involved in "run[ning] the gamut of the franchising process . . .").

In short, common sense, the purposes of the Regulation and its grandfather clause, the practical consequences of the competing interpretations and the equities as we discern them all bespeak the reasonableness of the FCC's interpretation. That interpretation has not been shown to be inconsistent with other FCC or judicial interpretations of grandfather clauses. *See, e.g., Crescent Express Lines,*

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[12] "Any . . . substantial change [in franchise fees] we consider to effectively terminate the existing franchise and that termination (or in effect the granting of a new franchise) requires recertification (or certification in the first instance on grandfathered franchises)." *Id.*

Inc. v. *United States*, 320 U.S. 401 (1943) (grandfathered carriers not given power to change quality of service). The interpretation has been adhered to in a rulemaking procedure in which the views of the industry, communities, and the public as a whole were aired. *See* text accompanying note 4 *supra*. While neither that proceeding nor the interpretation given below bind us, we are persuaded that, on balance, the FCC interpretation is reasonable[13] and comports with the public interest, to which the agency must in the first instance conform.

Petition to review denied.

FRIENDLY, *Circuit Judge*, dissenting:

The question here is a narrow one. Since the decision under review the FCC has engaged in further rulemaking under 5 U.S.C. § 553 and has dealt with the problem in a manner noted below. *In the Matter of Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, Docket 21002, 41 Pike & Fischer RR2d 885 (1977). The controversy is confined to the period betwen March 31, 1972 and November 7, 1977, the effective date of the amendments.

While I would be the last to suggest that an administrative agency must always follow the strict letter of its own regulation, we have not quite reached the Humpty Dumpty era where a word "means just what I choose it to mean, neither more nor less." There can be no fair doubt of the meaning of the grandfather clause, 47 C.F.R. § 76.31(b), quoted in footnote 2 to Judge Oakes' opinion, as a matter

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[13] *See INS* v. *Stanisic*, 395 U.S. 62, 72 (1969) (administrative interpretation controls when interpretation is not clearly wrong or inconsistent with regulation, citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

of ordinary English speech. The clause "grandfathered" existing systems, not simply existing rates.[1] Still I would not insist on the letter if some city sought to avail itself of the grandfather clause in a manner clearly contrary to its spirit, e.g., by doubling or tripling the franchise fee—assuming that this would not bring an end to the franchise or to the grandfather protection as the majority believe it well might. See 46 F.C.C.2d 175, 197 (1974). The instant problem is not of that sort at all. It has arisen from what the majority concedes to have been a development about which the Commission simply had not thought, to wit, the advent of state in addition to local regulation of certain cable television franchises and the concomitant desire of the legislators that the cost of the state regulation should be borne by the cable television industry, which can pass such costs on to its customers, rather than by all the citizenry of New York, most of whom have neither interest in nor ability to afford this service. These modest regulatory charges, limited by New York to the minimum necessary to cover the costs of regulation, and in no case to exceed 2% of gross annual receipts, were not the sort of exaction against which the Commission properly wished to guard. Rather they are precisely of the sort for which the grandfathering provisions were designed to provide "flexibility," see note 1 *supra*. As the majority says, "[t]he

[1] If there were any doubt, this would be removed by ¶ 187 of the *Cable Television Report and Order*, 36 F.C.C. 2d 143, 210 (1972):

> The grandfathering provisions of our rules with respect to franchise standards seek to achieve a large measure of flexibility. An existing cable system will be required to certify within five years of the effective date of these rules or on renewal of its franchise, whichever comes first, that its franchise meets the requirements of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause.

broad purpose of the franchise fee limitation was to check rising fees that were wholly unreasonable because they bore no relation to the costs of regulation." Since the New York State Commission's are precisely related to such costs, I see no sufficient reason for not holding the Commission to what it clearly said, rather than forcing the New York Commission into time-consuming and expensive litigation with municipalities on the issue of who has the prior claim to the permitted fees, an issue which if determined adversely to the Commission will leave the burden of regulatory costs on New York taxpayers generally rather than on the cable television companies and their customers.[2] The Commission noted in its recent rulemaking that "the growth of pay cable during the past few years has been robust," para. 70 & n.22, with the number of subscribers increasing a hundredfold in the period between March 1973 and June 1976; the intervenors will not perish if they are required to pay for the important functions with which the New York Commission has been charged, see N.Y. Executive Law, §§ 815, 822, 824, 825, 826, as the FCC grandfather regulation so plainly directed. Cf. *Amendment of Subparts B and C, supra*, 41 Pike & Fischer RR2d at 917 (J.R. Fogarty, Comm'r, concurring in part, dissenting in part).

The argument in favor of reading the regulation to mean what it says is strengthened by the ease with which the Commission could have changed it. See Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 648-49 (1974). In contrast to a statute, where time pressures and other factors bearing upon legislators may

[2] This burden will fall on the taxpayers at precisely the time the FCC has shifted most of the responsibility for regulating cable television back to state and local governments. See *Amendment of Subparts B and C, supra*, 41 Pike & Fischer RR 2d at 897, 899, 900.

render amendment a tedious process, the Commission, if dissatisfied with its grandfather clause, could readily have initiated a rulemaking proceeding under 5 U.S.C. § 553. When it ultimately did this, on a broader scale, it learned something about the grandfather provision—just what notice and comment rulemaking is supposed to accomplish. Although adhering to the general framework of the previous fee regulation, the FCC made two changes which may greatly assist the New York Commission in its efforts to make this industry pay for regulatory costs. The FCC was convinced, para. 69, "that franchising authorities do in fact have a regulatory involvement with pay cable and similar auxiliary services that justifies expanding the franchise fee base to include gross revenues derived from all cable services," rather than the payments from subscribers alone to which its previous regulation was limited. Also, in contrast to the discouraging statement about its waiver policy contained in its earlier report, 46 F.C.C.2d at 207, which is quoted in fn. 9 to the majority opinion, the FCC now announced, para. 59, "we are confident that our waiver processes can deal adequately with unusual cases." Hence, if the New York Commission now needs relief under the new rules—something that may not be needed in the future since, as we were told at argument, with start-up costs now having been covered and with cable revenues greatly increased, there was a likelihood of decrease in the expense of regulation as a percentage of revenues—there is a fair prospect New York can get this. For the past, matters should be left as the grandfather clause said they were to be.

I would grant the petition to review.

Appendix B, Order, United States Court of Appeals, Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of January, one thousand nine hundred and seventy-eight.

Present: Hon. Henry J. Friendly
Hon. Paul R. Hays
Hon. James L. Oakes
Circuit Judges.

77-4079

New York State Commission on Cable Television,
Petitioner

v.

Federal Communications Commission,
United States of America,
Respondents

Manhattan Carle Television, Inc., New York State Cable Television Association,
Intervenors.

A petition for review of an order of the Federal Communications Commission.

This cause came to be heard on a certified list of items comprising the record of the Federal Communications Commission and was argued by counsel.

Appendix B, Order, United States Court of Appeals, Second Circuit.

Upon consideration thereof, it is hereby ordered, adjudged, and decreed that the petition for review be and it hereby is denied in accordance with the opinion of this court, with costs to be taxed against the petitioner.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
Deputy Clerk

Appendix C, Declaratory Ruling, Federal Communications Commission.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

FCC 77-98

43907

In re:	)	
	)	
NEW YORK STATE COMMISSION ON CABLE TELEVISION	)	CSR-654
	)	
Petition for Reconsideration	)	

Declaratory Ruling

Adopted: February 3, 1977; Released: February 16, 1977

By the Commission: Commissioner Lee absent; Commissioners Quello and White concurring and issuing statements.

1. The New York State Commission on Cable Television has filed a petition requesting reconsideration of a portion of the declaratory ruling in *New York State Commission on Cable Television*, FCC 76-599, 59 FCC 2d 1344 (1976). Oppositions have been filed by Manhattan Cable Television, Inc., and the New York Cable Television Association.

2. At issue in the subject decision was whether Section 817 of Article 28 of the New York State Executive Law which authorizes the Commission on Cable Television of the State of New York to collect a fee from the New York cable television industry was consistent with Section 76.31 (b) of our Rules. We addressed three questions:

(a) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee is assessed upon "gross annual receipts" rather than "gross [annual] subscriber revenues"? We have concluded that the two provisions are consistent.

(b) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee when combined with an applicable municipal fee compels cable operators to pay in excess of 3% of their total gross subscriber revenues without a special showing? We have concluded that a special showing is required. Further, we find that New York has satisfied that showing.

(c) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee when combined with an applicable grandfathered municipal fee exceeds 5% of total gross subscriber revenues? We have concluded it is not.

59 FCC 2d at 1350-51.

3. Petitioner seeks reconsideration of that portion of the Commission's decision in "(c)" above, contending that this holding is based upon erroneous findings of fact and conclusions of law. Petitioner also states that it was not able to fully discuss this issue since it was raised by the parties opposing its original petition and was secondary to the issues raised in the original petition. Responding to the procedural point, the opposition pleadings contend that petitioner had ample opportunity to comment on such issues in the earlier proceeding prior to issuance of the declaratory ruling, but chose not to do so. Section 1.106(c) of the

Rules specifies the circumstances in which petitions for reconsideration should be considered. While petitioner has not shown any change in circumstances nor any previously unavailable facts since its last opportunity to present such matters, we believe the public interest requires a reexamination of the issues which are raised, and a clarification of our previous holding.[1]

4. The primary issue here is the meaning of Section 76.31(b) of the Commission's Rules as it applies to cable television systems in operation prior to March 31, 1972. Section 76.31(b) provides:

> Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977, whichever occurs first.[2]

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[1] *See* Section 1.106(c) of the Commission's Rules.

[2] The present wording of Section 76.31(b) which appears above differs somewhat from that quoted in the declaratory ruling, but the change does not affect the matters at issue here. The new wording was effective June 24, 1976. *Report and Order in Docket 20578*, FCC 76-448, 59 FCC 2d 378 (1976).

The Commission is asked to reconsider its position regarding the applicability of the provision during the 1972 to 1977[3] period. Specifically, would an increase between those dates in the total fee levied on an existing cable television system be proscribed by the rule where such an increase is beyond the limits specified in the provision and is due to a change in the fee levied by a state agency rather than by a local franchising authority?

5. In its earlier ruling the Commission stated: "[B]ecause the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation until March 31, 1977, as are fees imposed at an earlier date."[4] Petitioner argues that this is an erroneous conclusion, because Section 76.31(b) grandfathers cable television systems, and not any fees or assessments.[5] Petitioner also states that

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[3] On November 17, 1976, the Commission stayed the date for submitting a compliant franchise until March 31, 1978. *See* para. 36, *Notice of Proposed Rulemaking in Docket 21002*, FCC 76-1070, —— FCC 2d —— (1976). We do not believe this inquiry into the filing requirements (Section 76.13) and franchise standards (Section 76.31) bears on the instant proceeding.

[4] Para. 21, *New York State Commission on Cable Television*, FCC 76-599, 59 FCC 2d 1344, 1353 (1976).

[5] Also, petitioner argues that its interpretation is consistent with the Commission's purpose and intent which was to avoid the creation of new problems of conflicting regulation during the interim period, as reflected both in the *Letter of Intent*, FCC 71-787, 31 FCC 2d 115 (August 5, 1971), App. C, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 260 (1972), and in paragraph 187 of the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 210 (1972):

> *Grandfathering.* The grandfathering provisions of our rules with respect to franchise standards seek to achieve a large

(footnote continued on following page)

the Commission had no means of enforcing any provisions which grandfathered fees, because existing cable television systems were not obliged to even seek Commission certification until 1977 or the expiration of their franchises. The opposition pleadings argue that pre-March 31, 1972, franchise fees were grandfathered. They argue that Section 76.31(b) grandfathers each particular aspect of an existing cable system's operations and franchise, and that the last sentence of Section 76.31(b) grandfathers franchise fee provisions.[6] They contend that the Commission "did not mean to bless the subsequent creation of new inconsistencies with its guidelines."

6. At paragraph 22 of our declaratory ruling, 59 FCC 2d at 1353, we considered the effects of the state fee on two groups of New York cable operators: first, those whose local franchises call for a fee at or below the federal maximum of 3 to 5 percent, but for whom addition of the state fee would cause the appropriate limit of 5 percent to be exceeded; second, those operators whose payments to

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(footnote continued from preceding page)

> measure of flexibility. An exising cable system will be required to certify within five years of the effective date of these rules or on renewal of its franchise, whichever comes first, that its franchise meets the requirements of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause.

[6] It is argued that such an interpretation is consistent with previous cases, citing *Commonwealth Cable TV Co., Inc.* (Philadelphia, Pennsylvania), FCC 75-167, 51 FCC 2d 448, 449 (1975), and *CATV of Rockford, Inc.* (Rockford, Illinois), FCC 72-1005, 38 FCC 2d 10, 15 (1972). The opposition states that the purpose of the provision was not that cited by petitioner (see footnote 5), but was only "to avoid, during the interim period, conflicts between pre-existing local regulations and the new federal regulations in those instances where an existing franchise already contains fee provisions in excess of the new franchise guidelines."

local franchising authorities—having been established prior to March 31, 1972—are permitted to exceed the 3 to 5 percent federal maximum until the arrival of a date for strict franchise compliance (originally March 31, 1977; *but see* note 3, *supra*). We are asked to consider again whether any excess caused by the state fee, imposed after 1972, is to be permitted.

7. We originally answered that "because the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation until March 31, 1977, *as are fees imposed at an earlier date.*" 59 FCC 2d at 1353. (emphasis supplied). CCT claims that the effect of this is to grandfather a particular pre-1972 fee, raising a conflict with the grandfathering provision of Section 76.31(b) since the latter is addressed not to a fee but the system. Thus, says petitioner, "even the imposition of new and higher fees imposed on 'grandfathered' cable television systems during the interim period should be considered acceptable . . . ." (Pet., p. 11). Reading the grandfathering provision of Section 76.31(b) in light of the 1972 *Cable Television Report and Order* which adopted it, we find no specific application of the concept to fees but only a general concern to avoid "minor dislocations." 36 FCC 2d 143, 210. However, in reconsideration of the *Report and Order*, we stressed the equities involved in a cable operator's justifiable reliance on specific franchise terms negotiated before he was placed on notice of the contents of the 1972 Commission decision. For example:

> Therefore, we are modifying the rule so that franchises granted prior to March 31, 1972, will be processed even though they do not meet all the requirements of our new rules so long as there is substantial

> compliance. For instance, the delay attendant to renegotiation of a franchise requiring a 6% franchise fee would do more of a disservice to the public . . . than would *the fee itself*. . . . Further, any system that, in reliance *on the existing franchise*, has made a significant financial investment or entered into binding contractual agreements prior to the effective date of the rules but was not operational by that date, may request that *its inconsistent franchise* be grandfathered until March 31, 1977. . . .

36 FCC 2d at 366 (emphasis supplied). Admittedly, these statements were addressed to a discrete class of quasi-grandfathered systems, franchised but not operating prior to March 31, 1972, for whom the grace period would not be automatic but would be granted if "substantial compliance" were shown or criteria for special relief met. But the common factor for both grandfathered and quasi-grandfathered systems is a franchise negotiated prior to the effective date of the 1972 rules, for which our common concern—as expressed in the underlined passages—was to let specific franchise terms, justifiably relied upon by the parties, continue in effect during the 1972 to 1977 interim period. That equitable concept would be destroyed if, taking petitioner's view, the franchise fee were free to rise indiscriminately beyond its pre-1972 contract level.[7]

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[7] Since the issuance of the declaratory ruling under petition here, we have adopted a *Notice of Proposed Rulemaking in Docket 21002* (note 3, *supra*). There, at paragraph 37, we acknowledged that—because the Commission would not *require* the filing of franchises during the pendency of the rulemaking—franchise fee increases could occur without our being able to review such actions. Accordingly, we urged all parties to assist our efforts to maintain the status quo during the relatively brief interim period of the rulemaking, in which we are examining not only the franchise fee limit but all other federal franchise standards contained in Section 76.31 of the Rules.

8. Nor can petitioner's interpretation withstand our 1974 *Clarification of Rules,* where, at paragraphs 75 and 76, we stated that an increase in franchise fee would be deemed a "significant amendment" to a franchise—requiring either recertification (if a certificate based on the old fee already had been issued) or initial certification if the cable system had not yet applied. Since the result of such new or renewal certification "would automatically end any 'grandfathering' rights," CCT's claimed freedom to raise the fees of a grandfathered system is made a nullity. 46 FCC 2d 175, 196-97. Under the interpretation in our declaratory ruling, however, there is an applicable fee limit for each grandfathered and quasi-grandfathered system. It is that fee agreed to by the parties in their pre-1972 franchise negotiations. Since, as we ruled, the combined local and state fees may not exceed the grandfathered fee, the state's post-1972 assessment is not an increase in overall amount of the fee but a revised apportionment to the two governmental authorities involved. Thus, the amendment is not of federal significance and does not trigger new or renewed certification.[8]

9. Paragraph 22 of our original opinion inadvertently caused some confusion in its statement that

> if existing fees are increased by the addition of a state fee, this is acceptable *as long as the 5% limit is not exceeded.*

59 FCC 2d at 1353 (emphasis supplied). As we made plain earlier in that paragraph, because of grandfathering

[8] Nor do we believe that fee increases that take place wholly within the range of zero to 3 percent—or zero to 5 percent, if justified for the latter figure—are of federal significance. For example, an increase from 1 percent of gross subscriber revenues to 3 percent or, if justified, 5 percent of gross subscriber revenues would not be such as to trigger certification or recertification under the *Clarification of Rules, supra.*

not all systems will have a 5 percent limit during the grandfathered period. For them, the limit is represented by the grandfathered (pre-1972) local assessment. If that happens to be 6 percent, to repeat the earlier example, then the state's fee must be collected in such a way that the combined state and local assessments do not exceed 6 percent of a system's regular subscriber revenues. In light of the above, we are granting CCT's petition for reconsideration to the extent of accepting as correct the following statement from page 18 of its pleading:

> [I]f Section 818 [of the New York Law] does incorporate a "grandfathering" concept, then the imposition of a State assessment upon a cable system already subject to a "grandfathered" 6% municipal fee would be acceptable so long as the system did not . . . have to pay more than a total of 6% to the State and the municipality. (Footnote omitted)

10. Petitioner also makes an alternative argument, presented in response to a question it poses, to wit: Where the combined fee levied by state and local government authorities would exceed the limits of Section 76.31(b), how is the permissible fee to be divided between the two governmental bodies? Which government imposition must give way to the other, and in what manner? Petitioner contends that the Commission's decision made an unwarranted reliance on one possible interpretation of a state law and that the Commission thereby attempted to resolve the manner in which such a fee would be divided between the state and local governments.[9]

[9] In Paragraph 22 the Commission stated:

We note that Section 818 of the New York Law, as construed by the CCT, would seem to have taken into account the possi-

(footnote continued on following page)

11. We should restate our position in this regard. In the declaratory ruling we were attempting to indicate that one plausible interpretation of the New York Law would not appear to be inconsistent with our Rules. Nevertheless, we should repeat that the interpretation of state law is for the state courts to resolve. The apportionment of the permissible fee between the state and local governments is a matter for the New York courts. Additionally, although we previously stated that our opinion might have to be revised in light of another interpretation of the state law by the state court, it would not appear that any interpretation would affect our holding herein.

In view of the foregoing, a partial grant of the petition for reconsideration as indicated above would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by the New York State Commission

(footnote continued from preceding page)

bility of such a conflict with federal limitations and to have resolved it in such a manner that the combined state and local fees will not exceed the requirements of Section 76.31. CCT indicates that Section 818 makes clear that those fees charged by local governments, when added to the state fee, may not exceed the applicable federal limitations. Accordingly, the fact that both state and local fees will be levied does not render the state fee inconsistent with our rules. While the Association indicates that other interpretations of Section 818 than that set forth by CCT are possible and the full meaning of the section has not been judicially resolved, for purposes of this opinion we have assumed the correctness of the CCT construction. If there is a dispute as to the meaning of this section, it can only be resolved by the New York courts. And if the CCT reading turns out to be incorrect then this opinion will have to be revised in light of any different interpretation.

59 FCC 2d at 1353-54 (footnote omitted).

on Cable Television IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Concurring Statement of Commissioner James H. Quello
In Re: Limitations on State-Local Franchise Fees

I dissented to the Commission's declaratory ruling relative to limitations on state-local franchise fees, adopted June 24, 1976. 59 FCC 2nd 1344, 1354. I continue to be of the view expressed in that dissent with respect to the overall matter. However, recognizing the adoption of a Commission policy declaration, I must concur with the reasoning expressed in this subsequent declaratory ruling.

Concurring Statement of Commissioner Margita E. White

In Re: Limitations on State-Local Franchise Fees

I concur in the result of this order but differ somewhat in the rationale for achieving that result. I disagree that paragraphs 75 and 76 of the *Clarification* alone supply an adequate basis for the instant action. The proper basis for this decision, I believe, lies in paragraph 99 of the *Clarification*, where the Commission declared that "both local franchise fees and state fees, if any, will be added together to determine compliance with our fee limitations." 46 FCC 2d at 202. I read that paragraph to apply to both grandfathered and nongrandfathered systems. Thus, the fee existing at the time of the effective date of the 1972 Cable Rules was grandfathered, but the clarification specifically stated that fee level (grandfathered or otherwise) would be

looked at as a total figure with regard to any limitation. Where a state level fee would increase a local fee beyond the 5% limit, it would not be permitted beyond 5% or the existing grandfathered fee level. The question of whether the state fee is a "significant amendment" is supportive but essentially irrelevant.

No. 77-1529

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK STATE COMMISSION ON CABLE TELEVISION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1528

NEW YORK STATE COMMISSION ON CABLE TELEVISION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-14a) is reported at 571 F. 2d 95. The opinion of the Federal Communications Commission is reported at 59 F.C.C. 2d 1344. The Commission's opinion on rehearing (Pet. App. 17a-28a) is reported at 62 F.C.C. 975.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1978. The petition for a writ of certiorari was filed on April 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly interpreted its regulation governing franchise fee restrictions on cable television systems to prohibit increases in franchise fees for those systems falling within the "grandfather" clause of the regulation.

STATEMENT

1. In 1972 the Federal Communications Commission adopted a comprehensive set of regulations governing all aspects of cable television service, including broadcast signal carriage, public access, technical standards, and local franchise standards. One of the regulations, which is codified at 47 C.F.R. 76.31(b) (reprinted at Pet. 2-3) prohibited franchise fees from exceeding five percent of a cable system's gross subscriber revenues. The five percent ceiling was imposed in response to concerns that some municipalities were exacting exorbitant fees from cable systems, far in excess of the costs of regulating the systems. The regulation reflected the Commission's belief that excessive fees might burden the cable systems to such an extent that they could not fulfill their anticipated role in the development of new communications services (Pet. App. 4a-5a). *Cable Television Report and Order*, 36 F.C.C. 2d 143, 209.

Although the Commission concluded that the fee limitation was in the public interest, it recognized that many cable systems were already operating under franchises providing for fees somewhat in excess of five percent and that requiring immediate renegotiation of those franchises could be highly disruptive. *Reconsideration of the Cable Television Report and Order*, 36 F.C.C. 2d 326, 366. Accordingly, the Commission added a "grandfather" provision to the rules, permitting the

collection of larger franchise fees until March 31, 1977, or until the expiration of the current franchise, for systems in operation as of March 31, 1972. *Ibid.*[1]

2. Shortly after the "grandfather" provision was adopted, the State of New York established a program of statewide regulation of cable television systems and created petitioner New York State Commission on Cable Television to administer the program. Petitioner was authorized to collect up to one percent (later increased to two percent) of the gross annual receipts of all cable television systems in the state to cover the cost of the regulatory program. This fee was imposed in addition to existing municipal franchise fees (Pet. App. 5a).

Several cable television operators refused to pay some or all of the assessed fee, arguing that the state fee could not be added to those grandfathered municipal fees that were already in excess of the five percent permitted by the Commission's regulations. Petitioner then sought a declaratory ruling from the Commission that collection of the two percent state fee would be consistent with Section 76.31(b). Petitioner argued that as to those cable systems in operation as of the grandfather date, March 31, 1972, the franchise fee limitation is wholly inapplicable (Pet. App. 5a-6a).

The Commission denied the request for declaratory relief, holding that the state franchise fee may not be added to an existing municipal fee if the total fee would then exceed five percent. The Commission ruled that the grandfather clause in Section 76.31(b) permitted the

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[1]The termination date was subsequently extended. Grandfathered franchise fees may now continue in force until the expiration of the franchise, or for 15 years from the date it was granted, whichever occurs first. *Report and Order*, 66 F.C.C. 2d 380, 403.

continued collection of previously applicable fees, but that it would contravene the policy underlying the regulation to allow unlimited increases in fees on systems covered by the grandfather clause (Pet. App. 23a).

3. The court of appeals recognized that Section 76.31(b), if read literally as urged by petitioner, would "not make much sense" since it would effectively remove altogether the rule's restraints on franchises in operation as of the "grandfather" date. (Pet. App. 7a). The court rejected this literal interpretation and looked instead to the "common sense" of the regulation, "to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed" (Pet. App. 7a). With this analysis the court concluded (Pet. App. 8a) that

> [w]hat we are probably confronted with here is an inadvertent gap in the intent of the regulators: having never considered the possibility that either state or local authorities would increase fees on grandfathered systems where combined fees already exceeded the Regulation's limits prior to its adoption, the FCC did not explicitly preclude such increases in the Regulation.

Concluding that the rule was clearly intended to preserve existing fees, but not to expose existing systems to unlimited fee increases, the court sustained the Commission's interpretation of its regulation (Pet. App. 8a-11a).

ARGUMENT

1. Petitioner's principal contention is that Section 76.31(b) "refers to systems, not fees" and that on a literal reading, the grandfather clause wholly exempts systems in effect as of March 31, 1972 from the regulation, rather than freezing franchise fees for those systems (Pet. 12).

No doubt, the more natural reading of the regulation supports petitioner's view. A literal interpretation of the grandfather clause in this respect, however, is contrary to the policy underlying the rule. The fee limitations were imposed in order to protect cable systems from the imposition of financial burdens that could thwart their development and thus frustrate federal communications policy. *Cable Television Report and Order, supra,* 36 F.C.C. 2d 209. Franchise fees in excess of five percent were permitted under the grandfather clause simply to preserve contracts executed in good faith and to avoid the disruptions that would attend compulsory renegotiation of those contracts. The grandfather clause was intended to maintain the *status quo* on franchise fees, not to subject grandfathered systems to precisely the kinds of unrestrained fee increases that the regulation was designed to prohibit. Accordingly, the Commission's interpretation of the rule to bar petitioner's imposition of new and excessive fees on cable systems is entirely consistent with the purposes underlying the rule and its grandfather clause. For that reason, the court of appeals properly respected the agency's interpretation of its own regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414; see also *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 394 U.S. 367, 381.

As the court of appeals noted (Pet. App. 9a), petitioner's claim that the Commission's decision will cripple the state regulatory effort is unpersuasive. Under a recently adopted rule, the Commission permits franchise fees to be based on total system revenues rather than subscriber revenues, as was the case in the original rule. *Report and Order*, 66 F.C.C. 2d 380, 404 n. 27. This expanded fee base provides increased revenues on which state and municipal regulatory systems may draw to support their regulatory efforts. Moreover, if this increase

does not generate sufficient revenues, petitioner and other similarly situated regulatory bodies may seek a waiver of the fee limitation, which can be granted where a fee in excess of a total of five percent is needed for regulatory purposes, as petitioner claims to be the case here (Pet. App. 9a). See 47 C.F.R. 76.7.[2]

2. As petitioner acknowledges (Pet. 10), its contention that the Commission does not have statutory authority to limit franchise fees (Pet. 10-12) is raised for the first time in this Court. Having failed to raise the issue below, petitioner may not pursue it here. *Duignan* v. *United States*, 274 U.S. 195, 200; *Tyrrell* v. *District of Columbia*, 243 U.S. 1.

In any event, the challenged rule is within the Commission's jurisdiction over cable television. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649, the Court upheld the Commission's authority to promulgate cable television rules designed to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." *Id.* at 667-668. The rule at issue in this case fits this test precisely. As the Commission explained, the rule was responsive to evidence that the exorbitant fees exacted by some municipalities threatened the health and development of cable television services. *Cable Television Report and Order, supra*, 36 F.C.C. 2d at 209. Preventing the loss or deterioration of a communications service within a community is a well-recognized basis for the Commission's exercise of its regulatory authority. See *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440 (C.A.D.C.).

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[2]On June 2, 1978, petitioner in fact filed a petition with the Commission for waiver of the fee limitation. FCC Docket No. CSR-1287.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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